IN THE

Supreme Court of the United States

OCTOBER TERM, ...

CARLOS PRIO Socarras
and DANIEL VASQUEZ Coejo,

Petitioners.

versus

No. .....

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

(THE ENTIRE RECORD OF THE PROCEEDINGS IS SET FORTH IN THE APPENDICES HEREIN)

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

(THE ENTIRE RECORD OF THE PROCEEDINGS IS SET FORTH IN THE APPENDICES HEREIN)

The Petitioners, by and through counsel, pray that a writ of certiorari issue to review the final order of the United States Court of Appeals for the Fifth Circuit, denying petitioners' motion for leave to file a petition for a writ of mandamus. Petitioners were seeking to file a petition for a writ of mandamus with the United States Court of Appeals for the Fifth Circuit, the object of which was to obtain a writ of mandamus to direct The Honorable Emett C. Choate, Judge of the United States District Court for the Southern District of Florida,

Miami Division, to act upon and exercise his discretion as set forth in Rule 21(b) of the Federal Rules of Criminal Procedure.

OPINIONS BELOW

The motion for leave to file a petition for a writ of mandamus was denied, per curiam, without opinion, by the United States Court of Appeals on May 27, 1958, as set forth in "Appendix E."

The opinion of The Honorable Emett C. Choate, Judge of the United States District Court for the Southern District of Florida, Miami Division, denying petitioners' motion for transfer under Rule 21(b) of the Federal Rules of Criminal Procedure has not yet been reported, and is set forth in "Appendix D."

JURISDICTION

The judgment of the Court of Appeals was entered on May 27, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

MAY A QUALIFIED DEFENDANT IN A CRIMINAL MATTER HAVE A MOTION PURSUANT TO RULE 21(b) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE CONSIDERED BY THE JUDGE OF A DISTRICT COURT BEFORE WHOM REMOVAL PROCEEDINGS UNDER RULE 40 ARE PENDING?

THE LAW, STATUTES, AND RULES INVOLVED

Article III, Section 2, of the Constitution of the United States

Sixth Amendment to the Constitution of the United States

Sestion 960, Title 18 U.S.C.A., as amended

Rule 21 (b), Federal Rules of Criminal Procedure, provides:

"(b) OFFENSE COMMITTED IN TWO OR MORE DISTRICTS OR DIVISIONS. The court upon motion of the defendant shall transfer the proceeding as to him to another district or division, if it appears from the indictment or information or from a bill of particulars that the offense was committed in more than one district or division and if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged."

Rule 40(b)(3) of the Federal Rules of Criminal Procedure provides:

"Hearing; Warrant of Removal or Discharge. The defendant shall not be called upon to plead. If the defendant waives hearing, the judge shall issue a warrant of removal to the district where the prosecution is pending. If the defendant does not waive hearing, the commissioner or judge shall hear the evidence. If the commissioner hears the evidence he shall report his findings and recommendations to the judge. At the hearing the defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. If it appears from the commissioner's report or from the evidence adduced before the judge that sufficient ground has been shown for ordering the removal of the defendant, the judge shall issue a warrant of removal to the district where the prosecution is pending. Otherwise he shall discharge the defendant. If the prosecution is by indictment, a warrant of removal shall issue upon production of a certified copy of the indictment and upon proof that the defendant is the person named in the indictment. If the prosecution is by information or complaint, a warrant of removal shall issue upon the production of a certified copy of the information or complaint and upon proof that there is probable cause to believe that the defendant is guilty of the offense charged. If a warrant of removal is issued, the defendant shall be admitted to bail for appearance in the district in which the prosecution is pending in accordance with Rule 46. After a defendant is held for removal or is discharged, the papers in the proceeding and any bail taken shall be transmitted to the clerk of the district court in which the prosecution is pending."

STATEMENT OF THE CASE

An indictment was returned against the petitioners in the United States District Court for the Southern District of New York, on February 14, 1958, charging them with conspiracy to violate Section 960, Title 18, U.S.C.A.

There are eight defendants, all of whom are natives and citizens of Cuba. Carlos Prio Socarras is the ex-President of Cuba, who was ousted from office by force of arms by Dictator Batista. With the single exception of Jose Iriarte, all of the defendants reside in or within the proximity of the Miami area. All of the defendants who have submitted to custody have joined in a motion to transfer the proceedings to the United States District Court for the Southern District of Florida, Miami Division, from the United States District Court for the Southern District of New York, pursuant to the provisions of Rule 21(b) of the Federal Rules of Criminal Procedure.

The defendants, with the exception of Jose Iriarte, were arrested by the United States Marshal for the Southern District of Florida, Miami Division, at Miami, Florida, and have been released on bond pending removal proceedings pursuant to Rule 40 of the Federal Rules of Criminal Procedure. No warrant of removal has been issued by the United States District Court at Miami, Florida.

On May 5, 1958, The Honorable Emett C. Choate, Judge of the United States District Court at Miami, Florida, entered his order denying petitioners' motion to transfer pursuant to Rule 21(b), without prejudice to their right to apply to the United States District Court for the Southern District of New York. In so ruling, the Court stated that it was not acting upon the merits of the motion to transfer, but was denying the motion on the ground that the Court was without jurisdiction to receive, hear, and consider a motion for transfer pursuant to Rule 21(b), Federal Rules of Criminal Procedure, under the circumstances.

On May 21, 1958, a motion for leave to file a petition for writ of mandamus, with petition attached, was filed with the United States Court of Appeals for the Fifth Circuit, and the motion was denied, per curiam, on May 27, 1958.

The petitioners sought to have the United States Court of Appeals issue its writ of mandamus directing the United States District Court for the Southern District of Florida, Miami Division, and The Honorable Emett C. Choate, Judge thereof, to exercise the discretion provided in Rule 21(b) of the Federal Rules of Criminal Procedure.

The appendices hereto compose the entire record of the case, and "Appendix C" is incorporated herein in its entirety as petitioners' arugment in support of the petition.

REASONS FOR GRANTING THE WRIT

1. The question involved pertains to the construction and interpretation of a federal rule of criminal procedure, the application of which is of sufficient importance to warrant the consideration of the Supreme Court of the United States.

2. The question involved raises constitutional issues pertinent to the fair administration of justice under Article III, Section 2, and the Sixth Amendment to the Constitution of the United States.

3. An interpretation of Rule 21(b), Federal Rules of Criminal Procedure, which would require a defendant qualified thereunder to go to a far distant place to submit to any step in the course of a criminal proceeding, would frustrate the purpose and intent of the rule and the fair administration of justice.

4. It is apparent that not adverse law, but an unwritten rule of protocol between District Courts and between Circuit Courts, prevents a favorable exercise of Rule 21(b) of the Federal Rules of Criminal Procedure.

Under the circumstances, it is appropriate that the Supreme Court of the United States, unhampered by this protocol, resolve the issue as a matter of law and justice.

5. The Supreme Court of the United States, in *United States of America v. Romualdo Cores,* 26 Law Week 4316, (May 19, 1958) characterized Rule 21(b) to have "inherent flexibility" and to be a "valuable tool of justice." To interpret that a defendant in a criminal proceeding must make his motion under Rule 21(b) in a far distant place, under the circumstances, would be adverse to these described characteristics.

CONCLUSION

In view of the serious constitutional questions involved concerning the fair administration of justice in criminal proceedings, it is respectfully submitted that the petition for a writ of certiorari should be granted.

David W. Walters

DAVID W. WALTERS
Attorney for Petitioners
Suite 1008, Ainsley Building
Miami 32, Florida

June, 1958

"APPENDIX I"

IN THE

United States Court of Appeals

FIFTH CIRCUIT

UNITED STATES OF AMERICA

versus

CARLOS PRIO Socarras, also known as Carlos Prio; DANIEL VASQUEZ y Coejo, also known as Daniel Vasquez; GUIDO ADOLFO GONZALES DE BUSTAMANTE Luque, also known as Guido Bustamante; ENRIQUE COTUBANAMA HENRIQUEZ Laranzon, also known as Enrique Henriquez; JUAN AGUSTIN DE LA CARIDAORTA y Cordova, also known as Juan Orta; LUIS ALFONSO SILVA y Tablada, also known as Luis Silva and Al Fernandez; JOSE PABLO ELIO IRIARTE y Diaz, also known as Jose Iriarti; TULIO PRIETO; and LUIS CHAVIANO,

Defendants.

No.....

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS

COME NOW the defendants, CARLOS PRIO Socarras and DANIEL VASQUEZ y Coejo, by and through their undersigned attorney, and make this their motion for leave to file a petition for a writ of mandamus to direct The Honorable Emett C. Choate, Judge of the United States District Court for the Southern District

"APPENDIX II"

IN THE

United States Court of Appeals

FIFTH CIRCUIT

CARLOS PRIO Socarras, also known as Carlos Prio, and DANIEL VASQUEZ y Coejo, also known as Daniel Vasquez,

Petitioners,

versus

THE UNITED STATES OF AMERCA, THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION, ITS JUDGES AND OFFICERS, AND THE HONORABLE EMETT C. CHOATE, JUDGE THEREOF,

Respondents.

No.....

PETITION FOR A WRIT OF MANDAMUS

Come now CARLOS PRIO Socarras, also known as Carlos Prio, and DANIEL VASQUEZ y Coejo, also known as Daniel Vasquez, by and through their undersigned attorney, and with leave of the Court, do herewith petition for a writ of mandamus to be issued by the United States Court of Appeals for the Fifth Circuit, directing The Honorable Emett C. Choate, Judge of the United States District Court for the Southern District of Florida, Miami Division, to receive, hear, and consider petitioners' motion to transfer pursuant to Rule 21(b), Federal Rules of Criminal Procedure, and to exercise his discretion thereunder and, for reasons thereof, state:

1. That on February 13, 1958, an indictment was returned against the petitioners in the United States District Court for the Southern District of New York, Case No. C155-63, charging them with conspiracy to violate

Section 960, Title 18, United States Code. A copy of said indictment is hereto attached, marked "Appendix A", and made a part hereof.

2. That the defendants, residents of Miami, Florida, on March 7, 1958, did submit to the United States District Court for the Southern District of Florida, Miami Division, a motion to transfer the proceedings against them, pursuant to Rule 21(b), Federal Rules of Criminal Procedure, from the United States District Court for the Southern District of New York, to the United States District Court for the Southern District of Florida, Miami Division. Copies of motion to transfer the proceedings and memorandum in support thereof are hereto attached, marked "Appendix B" and "Appendix C", respectively, and made a part hereof.

3. On May 5, 1958, The Honorable Emett C. Choate, Judge of the United States District Court for the Southern District of Florida, Miami Division, entered his order denying petitioners' motion to transfer pursuant to Rule 21(b), Federal Rules of Criminal Procedure, without prejudice to their right to apply to the United States District Court for the Southern District of New York. In so ruling, the Court stated that it was not acting upon the merits of the motion to transfer, but was denying the motion on the ground that the Court was without jurisdiction to receive, hear, and consider a motion for transfer pursuant to Rule 21(b), Federal Rules of Criminal Procedure, under the circumstances. A copy of said order is hereto attached, marked "Appendix D", and made a part hereof.

4. The petitioners have not been removed pursuant to Rule 40 of the Federal Rules of Criminal Procedure, and are within the jurisdiction of the United States District Court for the Southern District of Florida, Miami Division, at the time of filing of this petition for a writ of mandamus.

5. The petitioners allege that in the event they are required to be removed to the jurisdiction of the United States District Court for the Southern District of New

York, in New York, they will suffer irreparable damage and prejudice to their right to have justice fairly administered pursuant to guaranties established by the Constitution of the United States.

6. That the rule of law in question as to whether or not, under the circumstances presented, a motion for transfer may be presented to the Court of concurrent jurisdiction, under Rule 21(b), Federal Rules of Criminal Procedure, wherein removal proceedings are pending under Rule 40 of the Federal Rules of Criminal Procedure, is an important legal question pertinent to the fair administration of justice in criminal matters.

7. That the failure of the United States District Judge at Miami, Florida, to exercise his discretion as outlined in Rule 21(b), Federal Rules of Criminal Procedure, is improper and inconsistent with the provisions, purposes, and intent of Rule 21(b), Federal Rules of Criminal Procedure.

8. That the petitioners are without other adequate relief from the Court's order of May 5, 1958, other than through the medium of a determination of their rights by a petition for a writ of mandamus, there being no right of appeal from the Court's order and failure to exercise the discretion vested in him under the provisions of Rule 21(b), Federal Rules of Criminal Procedure. (*Hudson v. Parker,* 15 S. Ct. 450)

WHEREFORE, petitioners pray that this Honorable Court issue its writ of mandamus, directing The Honorable Emett C. Choate, Judge of the United States District Court for the Southern District of Florida, Miami Division, to receive, hear, and consider petitioners' motion to transfer pursuant to Rule 21(b), Federal Rules of Criminal Procedure, and to exercise his discretion thereunder.

David W. Walters
Attorney for Defendants, Carlos Prio Socarras and Daniel Vasquez y Coejo

"APPENDIX A"

UNITED STATES OF AMERICA
SOUTHERN DISTRICT OF NEW YORK } ss:

I, HERBERT A. CHARLSON, Clerk of the United States District Court for the Southern District of New York, do hereby certify that the writings annexed to this certificate, to-wit: a Photostatic copy of Indictment in the case of *United States v. Carlos Prio Socarras et al.*, C155-63, have been compared with their originals on file and remaining of record in this office; that they are correct transcripts therefrom and of the whole of the said originals.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and affixed the seal of the said Court at the City of New York, in the Southern District of New York, this 13th day of February in the year of our Lord one thousand nine hundred and fifty-eight, and of the Independence of the United States the one hundred and eighty-second.

(District Court Seal)

HERBERT A. CHARLSON, Clerk

By:....., Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

CARLOS PRIO SOCARRAS, also known as Carlos Prio; DANIEL VASQUEZ Y COEJO, also known as Daniel Vasquez; GUIDO ADOLFO GONZALEZ DE BUSTAMANTE LUQUE, also known as Guido Bustamante; ENRIQUE COTUBANAMA HENRIQUEZ LARANZON, also known as Enrique Henriquez; JUAN AGUSTIN DE LA CARIDA ORTA Y CORDOVA, also known as Juan Orta; LUIS ALFONSO SILVA Y TABLADA, also known as Luis Silva and Al Fernandez; JOSE PABLO ELIO IRIARTE Y DIAZ, also known as Jose Iriarti; TULIO PRIETO; and LUIS CHAVIANO,

Defendants

Indictment

No.....

The Grand Jury charges:

1. That from, in or about May, 1956, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, and elsewhere, CARLOS PRIO SOCARRAS, also known as Carlos Prio; DANIEL VASQUEZ Y COEJO, also known as Daniel Vasquez; GUIDO ADOLFO GONZALEZ DE BUSTAMANTE LUQUE, also known as Guido Bustamante; ENRIQUE COTUBANAMA HENRIQUEZ LARANZON, also known as Enrique Henriquez; JUAN AGUSTIN DE LA CARIDA ORTA Y CORDOVA, also known as Juan Orta; LUIS ALFONSO SILVA Y TABLADA, also known as Luis Silva and Al Fernandez; JOSE PABLO ELIO IRIARTE Y DIAZ, also known as Jose Iriarti; TULIO PRIETO; and LUIS CHAVIANO, the defendants herein, unlawfully, wilfully and knowingly, did conspire with each other and with ALBERTO BAYO, also known as Alberto Giroud, Alberto Giroud Bayo, Alfredo Bayo, and Manuel Mangada; CESAR

AUGUSTO VEGA PELEGRINO, also known as Cesar Vega; WILLIAM B. WINGFIELD; CALIXTO SANCHEZ WHITE; SERGIO EUPLIO HEREDIA CORRALES, also known as Sergio Heredia; LEON OCTAVO RENE FIALLO LLUBERES, also known as Rene Fiallo; POLICARPO SOLER; LINO ELIAS Y LIMAS, also known as Lino Elias; GERARDO CASADO; CAESAR FONSECA; and CANDIDO DE LA TORRE, co-conspirators but not defendants herein, and with divers other persons to the Grand Jury unknown, to violate Section 960 Title 18, United States Code, in that they unlawfully, wilfully and knowingly did conspire to begin and set on foot, and to provide and prepare the means for, and to furnish money for and to take part in military expeditions and enterprises to be carried on from within the United States against the Republic of Cuba, a foreign state with which the United States, at all times mentioned herein, has been and is now at peace.

2. It was part of said conspiracy that said defendants and co-conspirators would organize and cause to be organized committees and groups for the purpose of effectuating military expeditions and enterprises to be carried out against the Republic of Cuba and to furnish and cause to be furnished monies for the operations of such committees and groups.

3. It was also a part of said conspiracy that said defendants and co-conspirators would recruit and encourage the recruitment of persons in the United States and elsewhere to participate in military expeditions and enterprises to be carried on from within the United States and elsewhere against the Republic of Cuba.

4. It was further a part of said conspiracy that said defendants and co-conspirators would establish and cause to be established military training camps in the Dominican Republic, the Republic of Mexico, the Republic of Haiti and the United States for the purpose of training persons to participate in military expeditions and enterprises against the Republic of Cuba, and that they would transport and cause to be transported such individuals to and from such military training camps.

5. It was further a part of said conspiracy that said defendants and co-conspirators would purchase and cause to be purchased motor ships for use in such military expeditions and enterprises and that the said defendants and co-conspirators would cause motor ships to sail from the United States and elsewhere, carrying armed, uniformed men, materials and implements of war for military expeditions and enterprises against the Republic of Cuba.

6. It was further a part of said conspiracy that said defendants and co-conspirators would train aircraft pilots and purchase military aircraft and armament for the purpose of bombing and strafing the Republic of Cuba from bases within the United States and elsewhere.

7. It was further a part of said conspiracy that said defendants and their co-conspirators would dispatch and cause to be dispatched men from the United States to the Republic of Cuba for the purpose of committing acts of sabotage against the Republic of Cuba and to assassinate officials of the government of the Republic of Cuba.

8. It was further a part of said conspiracy that said defendants and co-conspirators would purchase and cause to be purchased arms and other military equipment including but not limited to rifles, sub-machine guns, machine guns, hand grenades, flame throwers, anti-tank guns, carbines, and ammunition for such weapons, unforms, medical supplies, and food to be used in military expeditions and enterprises against the Republic of Cuba and that they would furnish and cause to be furnished money for the purchase of such arms, munitions and military equipment.

9. It was further a part of said conspiracy that said defendants and co-conspirators would transport and cause to be transported such arms, munitions and military equipment to various places of concealment in the United States from which places of concealment the arms, munitions and military equipment would be transported to the Republic of Cuba and elsewhere.

In pursuance and furtherance of said conspiracy and to effect the object thereof, the defendants and their co-conspirators did commit in the Southern District of New York and elsewhere, the following overt acts, among others.

OVERT ACTS

1. On or about December 7, 1956, JUAN AGUSTIN DE LA CARIDA ORTA Y CORDOVA, also known as Juan Orta, a defendent herein, did purchase in the Southern District of New York airplane tickets for the transportation of about nineteen individuals from New York City to Miami, Florida.

2. On or about May 19, 1957, CARLOS PRIO SOCARRAS, also known as Carlos Prio, a defendant herein, did speak at Miami, Florida, to a group of men prior to their departure on the motor vessel "Corinthia" for a military expedition against the Republic of Cuba.

3. On or about July 4, 1957, CARLOS PRIO SOCARRAS, also known as Carlos Prio; DANIEL VASQUEZ Y COETO, also known as Daniel Vasquez; GUIDO ADOLFO GONZALEZ DE BUSTAMANTE LUQUE, also known as Guido Bustamante, defendants herein, and CANDIDO DE LA TORRE, a co-conspirator herein, did attend and participate in a meeting held at Di Lido Island, Miami Beach, Florida.

4. In or about the spring of 1957 TULIO PRIETO, a defendant herein, at Morgan City, Louisiana, did furnish approximately $12,000 for the purchase of the motor vessel "Blue Chip".

5. On or about September 16, 1957, CARLOS PRIO SOCARRAS, also known as Carlos Prio, and JOSE PABLO ELIO IRIARTE Y DIAZ, also known as Jose Iriarti, defendants herein, and LEON OCTAVIO RENE FIALLO LLUBERES, also known as Rene Fiallo, a co-conspirator herein, did attend and participate in a meeting held in a hotel in the Southern District of New York.

6. On or about September 15, 1957, E QUE COTUBANAMA HENRIQUEZ LARANZON, also known s Enrique Henriquez, and JOSE PABLO ELIO IRIARTE Y DIAZ, also known as Jose Iriarti, defendants herein, did participate in a meeting held at Idlewild International Airport in New York.

7. On or about September 17, 1957, LUIS ALFONSO SILVA Y TABLADA, also known as Luis Silva and Al Fernandez, a defendant herein, participated in the transportation of a quantity of Thompson sub-machine guns from Alexandria, Virginia, to Savannah, Georgia.

8. In or about September, 1957, GUIDO ADOLFO GONZALEZ DE BUSTAMANTE LUQUE, also known as Guido Bustamante, a defendant herein, departed from Savannah, Georgia, in an automobile carrying a quantity of guns.

9. On or about October 27, 1957, JOSE PABLO ELIO IRIARTE Y DIAZ, also known as Jose Iriarti, a defendant herein, transported a quantity of Thompson sub-machine gun cartridge clips from Rochester, New York, to New York City, Southern District of New York.

10. On or about November 4, 1957, at Tarpon Springs, in the Southern District of Florida, CESAR AUGUSTO PELEGRINO, also known as Cesar Vega, a co-conspirator herein, did furnish approximately $3,900.00 in cash toward the purchase of the American M/V "Philomar III". (In violation of Section 371, Title 18, United States Code).

/s/ EUGENE J. HYNES
Foreman

/s/ WILLIAM F. TOMPKINS
Assistant Attorney General

/s/ PAUL W. WILLIAMS
United States Attorney

Endorsed: U. S. District Court, Southern District of New York.

Filed: February 13, 1958.

"APPENDIX B"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

No. 1510-M-Misc.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. C-155-63-Crim.

UNITED STATES OF AMERICA,

vs.

CARLOS PRIO SOCARRAS, also known as Carlos Prio; DANIEL VASQUEZ Y COEJO, also known as Daniel Vasquez; GUIDO ADOLFO GONZALEZ DE BUSTAMANTE LUQUE, also known as Guido Bustamante; ENRIQUE COTUBANAMA HENRIQUEZ LARANZON, also known as Enrique Henriquez; JUAN AGUSTIN DE LA CARIDA ORTA Y CORDOVA, also known as Juan Orta; LUIS ALFONSO SILVA Y TABLADA, also known as Luis Silva and Al Fernandez; JOSE PABLO ELIO IRIARTE Y DIAZ, also known as Jose Iriarti; TULIO PRIETO; and LUIS CHAVIANO,

Defendants.

Motion to Transfer Pursuant to Rule 21(b)

COME NOW the Defendants, CARLOS PRIO SOCARRAS and DANIEL VASQUEZ Y COEJO, by and through their undersigned attorneys, and make this their Motion for transfer of the proceedings from the United States District Court, Southern District of New York, to the Southern District of Florida, Miami Division, pursuant to Rule 21(b), Federal Rules of Criminal Procedure, and for reasons therefor state, to-wit:

1. Rule 21(b), Federal Rules of Criminal Procedure, provides as follows:

"(b) OFFENSE COMMITTED IN TWO OR MORE DISTRICTS OR DIVISIONS. The court upon motion of the defend-

ant shall transfer the proceeding as to him to another district or division, if it appears from the indictment or information or from a bill of particulars that the offense was committed in more than one district or division and if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged."

2. That an examination of the Indictment returned by the Federal Grand Jury under date of February 13, 1958, wherein CARLOS PRIO SOCARRAS and DANIEL VASQUEZ Y COEJO and six others were charged as defendants in an alleged conspiracy with others to violate Section 960, Title 18, United States Code, reveals that the offenses charged in the Indictment were alleged to have been committed within the jurisdiction of the Southern District of Florida, the Southern District of New York and other judicial districts in proximity to Florida.

3. That through the media of the newspapers and as a matter of public knowledge, it is known that several of the defendants, including CARLOS PRIO SOCARRAS, and a parade of innumerable Cubans in political exile and other variety of witnesses residing in the Miami area, did appear before various sessions of a Grand Jury impanelled at Miami, Florida, on matters pertaining to activities against the political totalitarianism of the dictator known as "Batista". It is further known that intense investigation by the Department of Justice, United States Treasury Department, United States Customs Service, Federal Bureau of Investigation, and the United States Immigration Service concerning these alleged activities centered about and took place principally within the Miami Area, but for reasons and motives best known to the Government, an Indictment against the defendants was brought in the United States District of the Southern District of New York.

4. That the defendants, CARLOS PRIO SOCARRAS and DANIEL VASQUEZ Y COEJO, represent that in the interest of justice further proceedings pursuant to the Indictment *should* be transferred to the United States

District Court for the Southern District of Florida, Miami Division, for the following reasons, to-wit:

(a) That the conspiracy was alleged to have been participated in by twenty (20) co-conspirators, only two (2) of whom reside within the New York area. The remaining eighteen (18) co-conspirators reside within the Miami area or were last located within or in the proximate area of Miami.

(b) That only the defendant, JOSE IRIARTE, resides within the New York area, and he has expressed a desire that he be tried within the jurisdiction of the United States District Court at Miami, Florida, both in the interests of justice and to the furtherance of his own defense against the charges contained in the Indictment. (Affidavit attached hereto).

(c) That it is anticipated that the defense witnesses will exceed 150 persons in number, all of whom reside in the Miami area or proximate thereto and the expense of transporting the witnesses to New York and the inconvenience to said witnesses would be burdensome, oppressive and vexatious and effect a serious hardship on both witnesses and defendants, and to the end that the accomplishment of justice would be seriously hampered and impaired.

(d) That the character and nature of the overt acts complained of in the Indictment make it evident that it will be necessary for the Government, as well as the defendants, to prove or disprove the allegations by means of extensive evidence and numerous witnesses from the Miami area, whereas the overt acts complained of in the Indictment to have taken place within the New York area are less complex and, for the most part, innocuous and innocent within themselves, requiring little or no proof to sustain or disprove.

(e) That the Indictment on its face is directed against offenses pertaining to alleged military expeditions against the dictator Batista from the shores of Florida or points in proximity thereto, thus placing the situs of the crime, if any, proximately within

the *more rightful* jurisdiction of the United States District Court for the Southern District of Florida, Miami Division.

(f) That the requiring of the defendants to go to New York and employ counsel in that distant city would be an unnecessary and burdensome expense upon the defendants and would seriously interfere with their ability to present their defenses to the best advantage, whereas the Government is ably represented by counsel in both Miami and New York and throughout the United States.

(g) That the defendants are entitled to a speedy trial and have reason to believe, because of the press of prior matters in New York, the United States District cannot present them with the opportunity of an immediate trial, whereas the opposite is true in the United States District Court at Miami.

(h) That this unprecedented criminal prosecution of the former president of a former democracy, populated by a people who look to the United States with respect and for example, demands the most strict administration of justice and democratic due process. The whole world is watchful of this historical phenomenon. Deference is due to the plea made in good faith that justice can only be done by the proceedings taking place within the Southern District of Florida, Miami Division.

5. Defendants, by reason of the preceding, have substantial reason to believe that further proceedings pursuant to the Indictment, if held in New York, would seriously hamper and impair their ability to defend themselves against the charges in the Indictment and would impair the fair administration of justice, whereas the prosecution would suffer no disadvantage or prejudice whatsoever by the transfer.

WHEREFORE, defendants move that this cause be transferred from the United States District Court, Southern District of New York, to the United States District Court, Southern District of Florida, Miami Division, and that all removal proceedings herein pursuant

to the Rule 40 of the Federal Rules of Criminal Procedure be stayed until the further order of the Court, pending appropriate judicial disposition of the Motion.

WALTERS, MOORE & COSTANZO,
Attorneys for Defendants,
CARLOS PRIO SOCARRAS and
DANIEL VASQUEZ Y COEJO,
1008 Ainsley Building,
Miami, Florida.

By DAVID W. WALTERS

I HEREBY CERTIFY that copy of the foregoing Motion was mailed to the United States Attorney at the Federal Building, 300 Northeast First Avenue, Miami, Florida.

this 7th day of March, 1958.

1958.

DAVID W. WALTERS

AFFIDAVIT

STATE OF FLORIDA }
COUNTY OF DADE }

I, JOSE IRIARTE, upon being duly sworn, depose and say:

That I am a co-defendant in the United States of America vs. Carlos Prio Socarras and Daniel Vasquez, et al, and, although a resident of the State of New York, it is my desire that the proceedings be transferred from the United States District Court for the Southern District of New York to the United States District Court for the Southern District of Florida, Miami Division, for the reason that it is my belief that the interests of justice, both as to myself and to my co-defendants, would be served by the transfer, inasmuch as the majority of my witnesses reside within the Miami area

and I am unable financially to defray the expense of transporting them to New York for purposes of trial.

JOSE IRIARTE

Sworn to and subscribed before me this
25 day of February, A. D. 1958.

(Notarial Seal)

MARJORIE V. SMITH
Notary Public, State of Florida

My commission expires Aug. 25, 1961. Bonded by American Surety Co. of N. Y.

"APPENDIX C"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

UNITED STATES OF AMERICA vs. CARLOS PRIO SOCARROS, DANIEL VASQUEZ Y COEJO, et al, Defendants.	No. 1510-M-Misc.

MEMORANDUM BRIEF IN SUPPORT OF MOTION TO TRANSFER UNDER RULE 21(b)

There are eight defendants, all of whom are natives and citizens of Cuba. Carlos Prio Socarros is the ex-president of Cuba, who was ousted from office by force of arms by the dictator Batista. With the single exception of Jose Iriarte, all of the defendants reside in, or within the proximity of, the Miami area. All of the defendants who have submitted to custody have joined in the Motion to transfer the proceedings to the United States District Court at Miami, Florida, from the United States District Court for the Southern District of New York, pursuant to Rule 21(b) of the Federal Rules of Criminal Procedure, which provides as follow:

> "(b) *Offense Committed in Two or More Districts or Divisions.* The court upon motion of the defendant shall transfer the proceeding as to him to another district or division, if it appears from the indictment or information or from a bill of particulars that the offense was committed in more than one district or division and if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which tne commission of the offense is charged."

The defendants, with the exception of Jose Iriarte, were arrested by the United States Marshal for the

Southern District of Florida, Miami Division, at Miami, Florida, and have been released on bond pending removal proceedings pursuant to Rule 40, Federal Rules of Criminal Procedure. The United States District Court for the Southern District of Florida, Miami Division, has pending before it proceedings preliminary to trial as a part of the prosecution under the indictment, a Motion to Transfer Pursuant to Rule 21(b), brought by the defendants, and removal proceedings pursuant to Rule 40 brought by the Government. Both rules have as their aim and objective the prevention on an *improvident* removal of a defendant to a distant point for further proceedings connected with the prosecution.

> "Rule 40, taken in its entirety, indicates its principal purpose is to bring the accused to trial. Former 18 U. S. C. A., Sec. 591, part of which was superseded by Rule 40 and the remainder incorporated in 18 U. S. C. A., Sec. 3041, indicated its object in its title, 'Arrest and removal for trial'. The Notes of the Advisory Committee on Rules declare that the purpose of Rule 40 is *to accord safeguards to a defendant against an improvident removal to a distant point for trial,* and at the same time curb the opportunity for delay and obstruction on the part of defendants attempting to frustrate prosecution." United States vs. Parker, 14 F.R.D. 146, p. 147. (Emphasis supplied.)

Rule 2 of the Federal Rules of Criminal Procedure provides:

> "These rules are intended to provide for the just determination of *every criminal proceeding.* They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay." (Emphasis supplied.)

As to Rule 21(b), the Court, in the United States v. National City Lines, 7 F.R.D. 393, pp. 395-396, said:

> "But we do not wish to be understood as approving the practice of indicting citizens of distant states in the courts of this District, where an indictment will lie in the state of the domicile of such person,

unless in exceptional cases, where the circumstances seem to demand that this course shall be taken. *To require a citizen to undertake a long journey across the continent to face his accusers, and to incur the expense of taking his witnesses, and of employing counsel in a distant city, involves a serious hardship, to which he ought not to be subjected if the case can be tried in a court of his own jurisdiction.*" (Emphasis supplied.)

"It was this practice, known to many of the members of the Advisory Committee, some of whom had been in Government service, which resulted in the adoption of this provision of the rules."

It is plain to see that these rules must be read in para materia to each other in order to arrive at a fair concept of the issues involved in this case. At first blush, the observer might be prone to believe that a motion by a defendant under Rule 21(b) must necessarily be brought in the court wherein the indictment was returned. There is no such authority for this belief. Neither is there a prohibition in the rules or in the appropriate case law that would prevent the bringing of such a motion by the defendant in the court wherein his arrest took place and any phase of the *prosecution* is therein pending, as, for example, proceedings under Rule 40. This thought is germinated perhaps for the reason that in almost every instance wherein a motion under Rule 21(b) is made, the arrest has taken place where the indictment occurred or the defendant is physically present before the court and that no case precisely in point is reported. However, the very essence of the rule is destroyed and justice is left undone where a defendant eligible for relief under Rule 21(b) is forced to incur the hardship and expense connected with appearing in some distant district for any *part or portion of the prosecution, no matter how preliminary.* In the U. S. vs. White, 95 F. Supp. 544, p. 548, the court said:

"On the other hand, in the application of Rule 21(b) it has now to be recognized that a defendant need not suffer, without objection or possible relief, his prosecution in a remote district whose selection

from two or more available areas involves, without controlling countervailing considerations, the imposition upon him of burdens, financial or otherwise, beyond his reasonable capacity to bear, or intercepts in practical effect the making of his appropriate defense, or threatens otherwise and unjustly to deny him a fair trial. Despite the suspicion of his guilt which may issue from his prosecution, he is protected by the presumption of innocence, rationally understood. *A trial judge is at great pains to emphasize that presumption in his charge to a jury in the trial of a criminal case. He ought not altogether to neglect it himself, even in the preliminary phases of prosecution.*" (Emphasis supplied.)

Rule 22 of the Federal Rules of Criminal Procedure states:

"TIME OF MOTION TO TRANSFER. A Motion to transfer under these rules may be made at or before arraignment or at such other time as the Court or these rules may prescribe."

It would appear to require a defendant to suffer the hardships and distasteful aspects of removal and to await the pleasures of the Government in its prosecution for arraignment in some distant place requiring the defendant to incur unusual expenses, retain counsel in that distant place and to thereafter expose himself to all the disabilities and disadvantages that the rule seeks to avoid would defeat, at least in substantial part, the purpose of the rule. There is a distinction between a case in which removal is sought for an offense committed solely in the district seeking the removal as against a removal where both districts have jurisdiction of the offense. More particularly, is this true where the indictment itself reveals that the court in which the removal proceedings are pending has a superior and *more rightful jurisdiction*. One of the prime objectives of Rule 21(b) is to prevent the robbing of a district of its "rightful jurisdiction".

"And before the same Institute, the late Judge George Z. Medalie of the Court of Appeals of New York, who had been United States Attorney for the

Southern District of New York, and was also a member of the Advisory Committee, stated in very forceful language, *the injustice of the rule which permitted the Government to hail defendants in a conspiracy case before tribunals far removed from the place of their residence where the conspiracy, if any existed, was hatched:*

> " 'Think of what else we have done. It is really a scandal in the Federal Administration, the frequent robbing of the Southern District of New York of its rightful jurisdiction. * * *' " U. S. v. National City Lines, supra. (Emphasis supplied.)

The defendants are charged with a *conspiracy* to violate Section 960 of Title 18, which provides as follows:

> "EXPEDITION AGAINST FRIENDLY NATION. Whoever, within the United States, knowingly begins or sets on foot or provides or prepares a means for or furnishes the money for, or takes part in, any military or naval expedition or enterprise to be carried on from thence against the territory or dominion of any foreign prince or state, or of any colony, district, or people with whom the United States is at peace, shall be fined not more than $3,000 or imprisoned not more than three years, or both. June 25, 1948, c. 645, 62 Stat. 745."

From an analysis of the acts complained of in the indictment, the more "rightful jurisdiction" is with the United States District Court at Miami, Florida, for the reasons stated in defendants' motions, even though overt acts complained of took place in both districts. Not only does the United States District Court at Miami, Florida, have jurisdiction of the offense, it has pending preliminary proceedings before it pertaining to the prosecution and the defendants themselves stand before it, rendering unto this court a more dominant jurisdiction over the entire proceedings at this point. Should the physical presence of the defendants shift to the United States District Court at New York, there would, of course, be no pending proceedings relating to the prosecution before the Court at Miami, Florida, and

a different view might necessarily have to be taken. The object of the rule is the furtherance of the "interest of justice" and *justice* is necessary from the very outset of a prosecution.

Judge Alexander Holtzoff, who was the Secretary of the Committee who promulgated the rule, in his most recent commentary on the rules, has said concerning Rule 21(b), that:

> "It creates a certain degree of equality between prosecution and defense in the choice of a place of trial."

In the United States v. United States District Court for Eastern District of Tennessee, et al, (209 Fed. 2d 575, p. 577) the Court said:

> "This quoted averment clearly reveals that the United States District Court for Eastern Tennessee possesses concurrent jurisdiction with the Middle Tennessee District Court to try this case. *A motion to transfer a criminal prosecution begun in one federal district court having jurisdiction of the subject matter, to another district also having jurisdiction is addressed to the discretion of the district judge to whom presented;* and his order transferring the case for trial in the other district is not reviewable by the judge of the latter district. See Holdsworth v. United States, 1 Cir., 179 F. 2d 933." (Emphasis ours.)

A criterion is thus established that the power to act upon a motion brought by a defendant under Rule 21(b) is addressed to the discretion of the district *"to whom it is presented"*. The defendants have addressed their application to the United States District Court at Miami, Florida, the court which has jurisdiction of the offenses alleged and before which proceedings connected with the prosecution are pending, and in which district the defendants are physically present. The court is not without judicial discretion to act under Rule 40 of the Federal Rules of Criminal Procedure, even though the removal is predicated upon an indictment. In the U. S. v. Parker, supra, the court said:

"Rule 40(b)(3) provides in part, 'If the prosecution is by indictment, a warrant of removal shall issue upon production of a certified copy of the indictment and upon proof that the defendant is the person named in the indictment.' While the sentence is mandatory in terms, however, it does not destroy but only limits the exercise of discretion by the Court. *The purpose in requiring that the judge must issue the order of removal was to make it a judicial, rather than a mere ministerial, act, so as to afford defendant reasonable protection.* Tinsley v. Treat, 1907, 205 U. S. 20, 27 S. Ct. 430, 51 L. Ed. 689; Beavers v. Henkel, 1904, 194 U. S. 73, 24 S. Ct. 605, 48 L. Ed. 882; United States v. Chiarito, D. C. Or. 1946, 69 F. Supp. 317. *It follows that in removal proceedings the Court is allowed some discretion, and may make inquiry whenever special facts are disclosed that seem to make questionable the propriety of removal.*" United States v. Johnson, D. C. Or. 1945, F. Supp. 615. (Emphasis supplied.)

In the United States vs. Wright, 15 F.R.D. 184 at p. 185, the court held that under Rule 40(b)(3), 18 U. S. C. A., *a district court has discretion in removal proceedings to make inquiry concerning the propriety of issuing a warrant of removal, even though a certified copy of the indictment is submitted and proof of the identity of the defendant is established.*

In the United States vs. Johnson, 63 F. Supp. 615, at 617-618, the court said:

"There is a view held in some quarters, I have heard, that a judge on removal proceedings may not go as far as I am going with this case; that when an indictment is presented to him, fair on its face, that is conclusive and he must order removal. That is the rubber-stamp theory. We find that running through quite a few Government departments these days. It ran very strongly through certain wartime administrative agencies. Compare Justice Murphy dissenting in Endicott Johnson Corp. v. Perkins, 317 U. S. 501, 510, 63 S. Ct. 339, 87 L. Ed. 424. The view is that a judge must rubber-stamp every application for removal where an indictment is presented that is

fair on its face. He may not make any inquiry behind the indictment as to whether or not, for instance, the defendant committed any crime, as charged, in the district seeking removal, or, as in this case, whether he was present in the district. * * * * *.

"And in so holding I claim the right, contrary to the rubber-stamp theory, to construe the statute and go behind the indictment and deal with the facts as they really are, on the authority of Tinsley v. Treat, 205 U. S. 20, 27 S. Ct. 430, 51 L. Ed. 689, and the cases which have since followed that decision, although with some modification of its constitutional doctrine." United States ex rel. Hughes v. Gault, 1926, 271 U. S. 142, 46 S. Ct. 459, 70 L. Ed. 875, United States ex rel. Kassin v. Mulligan, 1935, 295 U. S. 396, 55 S. Ct. 781, 79 L. Ed. 1501.

In United States v. Holdsworth, 9 F. R. D. 198, 203, the court said:

"The question of the jurisdiction of this Court in a criminal proceeding such as that at bar involves not only the powers of this court under the Federal Rules of Criminal Procedure, but also the fundamental constitutional rights of the defendant. The Constitution of the United States, Article III, Section 2, clause 3, provides that 'The Trial of All Crimes * * * shall be held in the State where the said Crimes shall have been committed * * *.' No action of the defendant can serve as a waiver of this jurisdictional requirement. No action of this court, done in disregard of this requirement, can render the requirement inoperative."

It is apparent that the jurisdiction that is created by virtue of the offense alleged having been committed within the court's jurisdiction is a factor, which confers upon this court the power and duty to act upon a motion brought under Rule 21(b), notwithstanding the fact that the indictment was brought in another district.

Judge Yankwitz' decision, in United States v. National City Lines, supra, has been frequently referred

to as having clearly outlined the standards and criteria that must be met in order to justify a transfer under Rule 21(b). They are outlined at page 398 of the decision as follows:

> "Courts have held that the indictment of a person away from his domicile which requires him to (1) *go to a distant place,* (2) *to employ counsel in a distant city* and (3) *to bring his witnesses from afar are hardships to be considered.* So is also, in the case of a corporate body, the fact that (4) its business headquarters are in another city, and (5) its records are there.
>
> "There is also what Judge Medalie has called *'the robbing'* of another district *'of its rightful jurisdiction.'*
>
> "These considerations apply whether the defendant be poor or rich, a small or large corporation. Neither the rules nor our system would justify the elimination of any of these elements merely because the defendants, or some of them, may be persons of great wealth or corporations with large resources.
>
> "The new rules give as their purpose 'to provide for the just determination of every criminal proceeding.' And we are enjoined to construe the rules to 'secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.'
>
> "So in this rule, also, we have an indication as to some of the elements—(7) *fairness* and (8) *elimination of unjustifiable expense*—to be considered in determining the meaning of the phrase 'in the interest of justice'. And the Supreme Court has recognized most of these elements, *fairness and the vexatiousness and oppressiveness of a trial away from the domicile of a defendant, whether he be an individual or a corporation,* as controlling in civil cases, the application of the doctrine of forum non conveniens, waranting a court in refusing to accept jurisdiction." (Emphasis supplied.)

An examination of the indictment and the facts alleged in the motion made it readily apparent that the defendants meet each and every qualification with the exception of those dealing with corporate bodies, which have no application to their particular circumstances. There probably could not be a more compelling set of circumstances for a favorable invocation of Rule 21(b).

The rule is mandatory by nature, although there is discretion of the court to determine what is in the interest of justice. And in that regard the discretion must be bound and guided by standards set forth herein. Judge Yankwitz, in the United States vs. National City Lines, supra, in that regard said at p. 397:

> "As the new rule is the sole authority for removal from one district to another, its scope must be determined from its language and the considerations which led to its enactment. In lodging the discretion in the trial judge, the Committee gave wide latitude to its exercise by stating that the transfer 'shall be' granted when the judge is satisfied it is 'in the interest of justice.' There is thus an element of obligatoriness in the provision ('shall') once a satisfactory showing is made. And the showing is subordinated to the condition that it convince the judge that the transfer is 'in the interest of justice'."

These standards have frequently been supported by the courts: (United States v. Erie Basin Metal Products Company, 79 F. Supp. 880, United States v. White, supra, etc., etc.). One of the evils which Rule 21(b) sought to prevent is most apparent in these proceedings. It is well known publicly that months of deliberation of at least one Grand Jury impanelled in Miami, Florida, concerning activities of Cubans in exile in this area preceded the indictment against the defendants in New York, after such prolonged deliberations by the Miami Grand Jury. Can it be that they were unsuccessful in proving "probable cause" to the satisfaction of the Grand Jury in Miami and thereafter proceeded to "shop about" for a jurisdiction wherein a Grand Jury might, for one reason or another, be more amenable to return-

ing an indictment? It is this practice that has been deplored in connection with conspiracy prosecutions by learned members of the bench and bar and at which Rule 21(b) was aimed.

The Government should not be so favored, and the defendants should be permitted to be placed on an equal basis for their defense by having *all proceedings connected with the prosecution* transferred to the United States District Court at Miami, Florida.

The Supreme Court of the United States has expressed concern regarding this problem: (United States v. Johnson, 65 S. Ct. 249, pp. 250-251):

> "Plainly enough, such leeway not only opens the door to needless hardship to an accused by prosecution remote from home and from appropriate facilities for defense. It also leads *to the appearance of abuses, if not to abuses, in the selection of what may be deemed a tribunal favorable to the prosecution.*
>
> "These are matters that touch closely the fair administration of criminal justice and public confidence in it, on which it ultimately rests. These are important factors in any consideration of the effective enforcement of the criminal law. They have been adverted to, from time to time, by eminent judges; and Congress has not been unmindful of them. *Questions of venue in criminal cases, therefore, are not merely matters of formal legal procedure. They raise deep issues of public policy in the light of which legislation must be construed.* If an enactment of Congress equally permits the underlying spirit of the constitutional concern for trial in the vicinage to be respected rather than to be disrespected, construction should go in the direction of constitutional policy even though not commanded by it."

Notwithstanding all the legal factors which favor the defendants in their motion for transfer under Rule 21(b) made to this Court, there is involved, in addition thereto, a matter of serious consequence to our nation. All of Latin America is watchful of these proceedings,

which involve what a majority of the Latin Americans believe to be the "rightful President of the Republic of Cuba". This is not the ordinary case of Government against defendant, and dangerous ramifications of a political nature are involved concerning this country's prestige. For this reason, the strictest observance of judicial due process is necessary as a matter of national welfare in world politics. It should not be interpreted that this great country is serving the purposes of a dictator in opposition to the efforts of a neighboring people to rise above the fetters of totalitarianism. By only the fair administration of justice can this end be accomplished.

Respectfully submitted,

WALTERS, MOORE & COSTANZO

By David W. Walters

I HEREBY CERTIFY the copy of the foregoing Memorandum Brief was served upon the United States Attorney at the Federal Building, Miami, Florida, by hand, this 28th day of February, A. D. 1958.

WALTERS, MOORE & COSTANZO

By David W. Walters

"APPENDIX D"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

UNITED STATES OF AMERICA

v.

CARLOS PRIO SOCARRAS, also known as Carlos Prio; DANIEL VASQUEZ Y COEJO, also known as Daniel Vasquez; GUIDO ADOLFO GONZALEZ DE BUSTAMANTE LUQUE, also known as Guido Bustamante; ENRIQUE COTUBANAMA HENRIQUE LARANZON, also known as Enrique Henriquez; JUAN AGUSTIN DE LA CARIDA ORTA Y CORDOVA, also known as Juan Orta; LUIS ALFONSO SILVA Y TABLADA, also known as Luis Silva and Al Fernandez; JOSE PABLO ELIO IRIARTE Y DIAZ, also known as Jose Iriarti; TULIO PRIETO and LUIS CHAVIANO,

Defendants.

No. 1510-M-Misc.

ORDER AND OPINION THEREON

This cause came on to be heard upon the defendants' motions for (1) Transfer of Proceedings pursuant to Rule 21(b) of the Federal Rules of Criminal Procedure and (2) for Inspection of Grand Jury minutes by the Court in connection with the above motions.

The first motion complains that all of the defendants desire the above proceedings or cause be transferred to this Court from the United States District Court, Southern District of New York, and for grounds state:

That only one of the defendants resides in New York and that the remainder reside in the Southern District of Florida; that the matters and things complained about in the indictment substantially pertain to the al-

leged activities of the several defendants in the Southern District of Florida; that the grand jury in the Southern District of Florida actually investigated the activities of the defendants as respects the alleged offenses over a period of months; that practically all the witnesses that would be called in the case would be residents of the Southern District of Florida; and that it would be necessary to call approximately 150 witnesses for the defense from this area, and that it would impose a great hardship upon the defendants to defend the case in New York.

The motion to inspect the grand jury minutes was granted and the Court did inspect the minutes and found that the allegations in the defendants' motions that the matter had been investigated in the State of Florida by a grand jury impaneled in the Southern District of Florida over a period of time extending from April 5, 1957, to November 26, 1957. The Transcript of the minutes contained approximately 1500 pages. The minutes did not disclose any attempt on the part of the government to obtain indictments in the Southern District of Florida but did disclose a very complete investigation concerning the activities of Messrs. Prio, Orta and Vasquez and the activities of all of them who were actively opposing the government of President Batista of the Republic of Cuba. There appeared before the grand jury in Florida, Mr. William F. Tompkins, a Mr. Nathan Lenvin and others representing the government. At one time during the Grand Jury proceedings, Mr. Lenvin stated,

> "at this time this information is not sufficiently specific to warrant a request of the grand jury for the return of an indictment but we are anxious to conduct an investigative proceeding before this grand jury to determine exactly, if we can, what these groups and individuals have been doing within the United States which may be in violation of Federal Statutes. It may be that at the close of this proceeding the evidence will be sufficient to warrant submitting the matters for your consideration for the return of an indictment, but at this stage of the proceedings, we are engaged in exploratory procedure."

It did appear that in this exploratory investigation that the question of military expeditions and supplies, both from Florida and the Dominican Republic, was gone into in considerable detail and the question of the transportation of men and arms to and from the Dominican Republic was in like manner explored, and the question of the sources of the money for the purchase of equipment was the subject of such testimony. Generally the subject matter was the same subject matter which was described in the indictment in this case.

The main premise of the motion to examine the grand jury minutes was to bring before this Court, alleged proof that the indictment in a distance place (New York) was an attempt upon the part of the prosecuting authorities to seek a favorable climate for the prosecution and to impair the ability of the defendants to properly defend themselves.

There can, of course, be no argument that Rule 21(b) was adopted to provide that defendants should be protected by a transfer of proceedings where their rights would be otherwise impaired, or their defenses impeded. Further, there can be no dispute that the rule was adopted in part at least to amplify the constitutional provisions provided for in the United States Constitution, Article III, §2, and the Sixth Amendment.

In the case of the United States vs. Johnson, 323 U. S. 273, 275, Justice Frankfurter stated as follows in respect to the safeguards of the Constitution in the trial of criminal matters:

> "Aware of the unfairness and hardship to which trial in an environment alien to the accused exposes him, the Framers wrote that 'The Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed . . .' Article III, §2. As though to underscore the importance of this safeguard, it was reinforced by the provision of the Bill of Rights requiring trial 'by an impartial jury of the State and district wherein the crime shall have been committed'."

On page 276, of the above cited opinion, he went on to say:

> "These are matters that touch closely the fair administration of criminal justice and public confidence in it, on which it ultimately rests."

He further stated on page 278:

> "While it might facilitate the Government's prosecution * * * there must be balanced against the inconvenience of transporting the Government's witnesses * * * the serious hardship of defending prosecutions in places remote from home * * * as well as the temptation to abuses, already referred to, in the administration of criminal justice."

Undoubtedly, the defendants have a right to apply under Rule 21(b) for a transfer of this cause and further their statement that the Government is seeking a favorable climate for a prosecution would in addition to any right under Rule 21(b) warrant some inquiry.

While the rule itself does not state that the Court where the charge is pending has exclusive control over transfer, it is this Court's opinion that such a control is implied. However, this Court has been impressed with the argument of counsel for the defendants that the efficiency of the rule would be, and is greatly impeded, if the defendants are required to travel some 1200 miles to a distant Court to gain relief through a transfer of proceedings, and which they may well be entitled to in the first place, namely, a trial where they can, in justice, properly defend themselves. Counsel has pointed out that in many cases, and even in the case of many of these defendants, the accused do not have sufficient sums of money to properly present their matters in New York. Counsel for defendant argues that it would be an evil rule, and a useless one, to say to improvident defendants that you must do what you are unable to do financially, namely, travel to that distant spot, hire counsel and present your application for a transfer.

Impressive as this argument is, it is this Court's feeling that except where Courts are willing to have motions heard and determined elsewhere, that in order to prevent confusion and differences between Courts, and to preserve the inherent right of a Court to control all of its own cases, that under the present Rule 21(b), the matter of transfer should be heard by the Court in which the case is pending. I do believe, however, that the rule-makers should seriously consider changing the rule in some manner as to permit the Court where the majority of defendants and their witnesses reside, and where at least some of the acts complained of occurred, to exercise the right to hear and dispose of such motions. Further, it is this Court's belief that the law should be changed to clearly provide that where the offense in whole or part is charged to have taken place at the residence of the defendants, the right of removal should be absolute. Otherwise the protection of the Constitution and the Bill of Rights could become meaningless.

The motions on behalf of defendants to transfer proceedings pursuant to Rule 21(b), Rules of Criminal Procedure, are denied, without prejudice to their right to apply to the Court in the Southern District of New York.

DATED in chambers at Miami, Florida, this 5th day of May, 1958.

EMETT C. CHOATE
United States District Judge

"APPENDIX E"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 17252

IN RE CARLOS PRIO SOCARRAS and

DANIEL VASQUEZ y COEJO

PRAYING FOR WRIT OF MANDAMUS

Before RIVES, JONES and BROWN, Circuit Judges
PER CURIAM:

Application for leave to file petition for writ of mandamus is DENIED.

ENTER: MAY 27, 1958

CERTIFICATE AS TO SERVICE OF COPIES OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATE OF FLORIDA
COUNTY OF DADE } ss:

DAVID W. WALTERS, being first duly sworn, on oath deposes and says that he is attorney for the petitioners, CARLOS PRIO Socarras and DANIEL VASQUEZ y Coejo in the above-styled cause; that on the 23rd day of June A.D., 1958, he mailed five (5) copies of petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit in the above-styled cause to: THE HONORABLE JAMES L. GUILMARTIN, United States Attorney, Post Office Building, Miami 32, Florida.

David W. Walters

David W. Walters

Subscribed and sworn to before

me at Miami, Florida, June 23, 1958

s/ Jean S. Walters

Notary Public, State of Florida at Large
My commission expires Sept. 15, 1959
Bonded by American Surety Co. of N. Y.

FILE COPY

FILED
AUG 11 1958
JOHN T. FEY, Clerk

No. 183

In the Supreme Court of the United States

OCTOBER TERM, 1958

CARLOS PRIO SOCARRAS AND DANIEL VASQUEZ COEJO,
PETITIONERS

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
Department of Justice,
Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 183

CARLOS PRIO SOCARRAS AND DANIEL VASQUEZ COEJO, PETITIONERS

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On February 13, 1958, an indictment (Pet. App. 8-12) was returned in the United States District Court for the Southern District of New York charging petitioners and other named defendants with having conspired, in that District and elsewhere, to set on foot, furnish money for, and take part in military expeditions from within the United States against the Republic of Cuba, a foreign state with which the United States was at peace, in violation of 18 U.S.C. 960. Approximately one week later, petitioners were

arrested in Miami in the Southern District of Florida. They were accorded a preliminary hearing in the United States District Court for that District in connection with proceedings under Rule 40, Federal Rules of Criminal Procedure, to remove them to the Southern District of New York for trial, and were released on bond (Pet. App. 19-20).

On March 7, 1958, petitioners filed in this same court (*i.e.*, the District Court for the Southern District of Florida) a motion to transfer the pending criminal prosecution to that court from the District Court for the Southern District of New York (Pet. App. 13-17). This motion purported to be filed pursuant to Rule 21(b) of the Federal Rules of Criminal Procedure, which provides as follows:

> RULE 21. TRANSFER FROM THE DISTRICT OR DIVISION FOR TRIAL
>
> * * * *
>
> *(b) Offense Committed in Two or More Districts or Divisions.*
>
> The court upon motion of the defendant shall transfer the proceeding as to him to another district or division, if it appears from the indictment or information or from a bill of particulars that the offense was committed in more than one district or division and if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged.
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> * * * *

On May 5, 1958, the District Court (Choate, D. J.) entered an order and opinion (Pet. App. 31-35) denying the motion on the ground that, while "[u]ndoubtedly, the defendants have a right to apply under Rule 21(b) for a transfer of this cause" (Pet. App. 34), and "[w]hile the rule itself does not state that the Court where the charge is pending has exclusive control over transfer" (*ibid.*), such exclusive control by the court in which the charge is pending "is implied" by the terms of the rule (*ibid.*). The denial was "without prejudice to [petitioners'] right to apply to the Court in the Southern District of New York" for the transfer sought (Pet. App. 35).

On May 21, 1958, petitioners filed in the United States Court of Appeals for the Fifth Circuit a motion for leave to file a petition for a writ of mandamus (Pet. App. 1-3)—to which was attached the petition proposed to be filed (Pet. App. 4-6)—directing Judge Choate to "act upon and exercise his discretion as set forth in Rule 21(b)" (Pet. App. 2). On May 27, 1958, the Court of Appeals entered a *per curiam* order, without opinion, denying the leave sought (Pet. App. 37). The petition for a writ of certiorari, filed July 16, 1958, seeks review of this judgment.

The decision of the District Court—that under Rule 21(b) only the court in which the criminal indictment or information is pending has power to transfer the cause to another district under the conditions and for the reasons stated therein—is clearly correct, and the petition for mandamus by which petitioners seek to compel the District Court to act under the Rule is, accordingly, without merit. In

any event, the action of the court below in denying leave to file the petition for mandamus presents no question warranting review by this Court.

Rule 21 simply sets forth certain conditions under which the accused in a criminal prosecution may seek a change of venue. But, historically and logically, the court to which application must be made for a change of venue is the court in which the indictment is pending. Cf. *Kott* v. *United States*, 163 F. 2d 984, 987 (C.A. 5), certiorari denied, 333 U.S. 837; *United States* v. *White*, 95 F. Supp. 544 (D. Neb.).[1] Petitioners in this case have asked the court *to* which they desire to have the prosecution transferred to order such transfer, completely by-passing the court *from* which they would have the cause transferred. Their interpretation of the Rule is in the face of its plain terms (at least its clear implication, as the District Court noted), is completely without precedent, and is logically unsupportable. To adopt such an interpretation would mean that the court in which a prosecution is brought could be ousted of its power to hear the case, without its consent, by the order of a sister court of coordinate jurisdiction.[2]

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[1] And cf. *Ticoli Realty* v. *Interstate Circuit*, 167 F. 2d 155, 156 (C.A. 5), certiorari denied, 334 U.S. 837, pointing out that the doctrine of *forum non conveniens* (see 28 U.S.C. 1404)—which is the civil-law analogue of a motion to transfer a criminal prosecution under Rule 21, F.R. Crim. P.—"involves the use of discretion on the part of *the court in which the suit is brought*" (emphasis added). See also *Gulf Oil Corporation* v. *Gilbert*, 330 U.S. 501, 508.

[2] It is evident, furthermore, that the proper administration of justice could be seriously impaired if courts other

Petitioners, as noted by the District Court here, are of course entitled to seek to have their prosecution transferred from the New York District Court to the Florida District Court and to present such reasons as they may have why such transfer would, in their opinion, be "in the interest of justice". But their application for such transfer must, for the reasons stated, be addressed in the first instance to the court in which their indictment is pending.[3]

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than the court in which an indictment was pending could each determine the merits of a motion to transfer. Suppose, for example, that multiple defendants, each residing in a different district, were indicted in one district and arrested in their home districts. If petitioners' position were tenable, each such defendant could move in the district of his arrest for transfer of the cause to that district. The result might well be conflicting decisions and multiple trials where only a single trial would be proper. It was doubtless with such a result in mind that the District Court in the case at bar, in denying petitioners' motion to transfer, observed that, "in order to prevent confusion and differences between Courts, and to preserve the inherent right of a Court to control all of its own cases, * * * the matter of transfer should be heard by the Court in which the case is pending" (Pet. App. 35).

[3] Petitioners (Pet. 5) urge that "An interpretation of Rule 21(b), Federal Rules of Criminal Procedure, which would require a defendant qualified thereunder to go to a far distant place to submit to any step in the course of a criminal proceeding, would frustrate the purpose and intent of the rule and the fair administration of justice." The District Court, although disclaiming jurisdiction under Rule 21(b), stated (Pet. App. 31) it was "impressed" with that argument.

But the problem posed is wholly hypothetical on the facts of this case, for no such interpretation has yet been made. Thus far, petitioners have made no effort to have the New York District Court consider a Rule 21(b) motion without the presence of the petitioners in that district. Rule 22, it

For these reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

AUGUST 1958.

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should be noted, expressly provides that "A motion to transfer under these rules may be made at *or before* arraignment * * *" (emphasis added); an appearance by the petitioners in the New York District Court for the purpose of pleading to the indictment, therefore, is not a prerequisite to a proper motion to transfer. Whether petitioners' presence might be required for other reasons (*e. g.*, the taking of testimony at a hearing on the motion if affidavits and depositions were deemed inadequate) is wholly speculative at this juncture.

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